

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

VALLEJO GARBAGE SERVICE

Employer-Petitioner

and

Case 20-UC-410

TEAMSTERS LOCAL 490, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Union

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The record reflects that the Employer-Petitioner, with a place of business in Vallejo, California, is engaged in the business of providing garbage collection services. The parties stipulated, and I find, that during the fiscal year ending September 30, 2003, the Employer-Petitioner purchased and received at its Vallejo facility, goods valued in excess of \$50,000, directly from suppliers located outside the State of California. Based

on the parties' stipulation to such facts, I find that the Employer-Petitioner is engaged in commerce and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.

4. On March 3, 2004, in Case 20-RC-17933, the Union was certified as the exclusive collective-bargaining representative of the Employer-Petitioner's employees in the following unit:

All full-time and regular part-time office and clerical employees employed by the Employer-Petitioner at its facility located at 2021 Broadway, Vallejo, California; excluding all other employees, confidential employees, guards and supervisors as defined in the Act.

By the instant petition, the Employer-Petitioner seeks to clarify the unit to exclude the classifications of assistant office manager and human resources coordinator.

Specifically, the Employer-Petitioner contends that Assistant Office Manager Nicci King should be excluded from the unit as a statutory supervisor or a confidential employee and that Human Resources Coordinator Lisa Logoteta should be excluded as a confidential employee.¹ The Union would include the individuals in both classifications in the unit.

For the reasons discussed below, I find that Assistant Office Manager King is a statutory supervisor and exclude her from the unit. I also find that the Human Resources Coordinator Logoteta is not a confidential employee and include her in the unit.

¹ As of the date of the hearing, the parties had held one bargaining session and no collective-bargaining agreement had been reached.

The Employer-Petitioner's Operation. The Employer-Petitioner operates a garbage collection and disposal company in Vallejo, California, employing about 75 employees. Its operations are headed by General Manager Peter Friesen, Operations Manager Tom Phillips, Office Manager Trini Baker, Refuse Collection Manager Scott Pardini and Recycling Manager Sara Gallegos-Ascencio. Under Pardini are a route foreman, a shop foreman, and approximately 30 to 40 drivers, mechanics, and other shop employees. Under Gallegos-Ascencio is a recycling foreman and approximately 15 recycling employees. The drivers, shop employees, and recycling employees are all represented by the Union under a collective-bargaining agreement with the Employer-Petitioner, which covers a unit separate from the office and clerical unit for which this unit clarification petition has been filed.

Assistant Office Manager Nicci King. As noted above, the Employer-Petitioner seeks to clarify the unit to exclude Assistant Office Manager Nicci King as a statutory supervisor or confidential employee. The Union takes the opposite view. For the reasons discussed below, I find that King is a statutory supervisor and I exclude her from the unit on that basis. In so doing, I do not reach the issue of her status as a confidential employee.

The record contains a job posting for the position of "office manager 2," which is identified as being the same position as that of assistant office manager. The job posting states that the person in this position provides administrative and accounting functions with a subordinate staff. Duties listed for the position include maintaining account books, preparing reports, managing banking, resolving customer service problems, handling billing, collection and accounting functions, maintaining office equipment and

supplies, filing injury reports for workers' compensation claims, and filling in for absent employees on an as needed basis.² The posting further states that the person in this position directs the work of two or more subordinates and carries out supervisory responsibilities in accordance with the organization's policies and applicable laws, including handling the following functions with respect to employees: hiring, interviewing, training, planning, assigning and directing work, rewarding, disciplining, addressing complaints and resolving problems. The qualifications for the position include five years of experience in office management.

Nicci King has been the assistant office manager since approximately 2002. Directly reporting to King are Human Resources Coordinator Lisa Logoteta and Accounts Payable Clerk Veronica Denis. King also shares responsibility for supervising the Employer-Petitioner's five customer service representatives (CSRs) with Office Manager Trini Baker, to whom these employees directly report.³

With regard to King's authority to hire and promote or to effectively recommend such actions, the record discloses that King is not regularly involved in interviewing potential candidates for hire. However, in calendar year 2002, King recommended Lisa Logoteta's promotion to human resources coordinator from CSR and the Employer-Petitioner promoted Logoteta, despite the fact that other managers expressed reservations about Logoteta's ability to do the job. King also recommended the hire of Rachel Yanez

² The record reflects that King serves as backup for payroll clerk functions when Human Resources Coordinator Lisa Logoteta is absent.

³ Operations Manager Phillips testified that Baker directs the assistant office manager and the customer service representatives and has authority to hire, fire, resolve grievances, determine vacation scheduling, grant time off and assign overtime. Phillips further testified that while Baker did not attend the only collective-bargaining negotiating session the Employer-Petitioner has held with the Union to date in the clerical unit, he anticipate that she would be involved in the future.

into a permanent CSR position after Yanez had worked for the Employer-Petitioner as a temporary employee. According to Operations Manager Phillips, he had “rubberstamped” King’s recommendation and hired Yanez despite his having reservations about the decision.

Operations Manager Phillips testified that King has the authority to discipline employees up to and including termination without obtaining prior approval, but that she had never done so. The record indicates that King has verbally counseled employees on several occasions, including counseling Human Resources Coordinator Logoteta on approximately four occasions about being late to work. As discussed below, while these counselings affected Logoteta’s appraisal in 2003, there is no evidence in the record that they have led to further disciplinary action or resulted in any other negative consequences to her.

Phillips, General Manager Friesen and King further testified that King was involved in the termination of CSR Tonya Hall for poor job performance and attendance problems. According to Friesen and King, King directly supervised Hall and took extensive notes about Hall’s poor work performance in order to document the Employer-Petitioner’s decision to discipline Hall. On at least one occasion, Office Manager Baker and King met with Hall to discuss Hall’s failure to timely enter weight tag information into the Employer-Petitioner’s computer system. King thereafter documented this meeting with a memorandum.⁴ King also relayed the complaints of other employees about Hall to Friesen and Phillips. Both Friesen and Phillips testified that King had

⁴ According to King, the memorandum she prepared concerning this meeting was subsequently used to document Hall’s termination.

recommended that Hall be terminated and that they had followed her recommendation in terminating Hall. However, in this regard, Phillips further testified that he and Friesen had conducted their own independent investigation into Hall's situation, which they would do in any situation where the decision to discipline an employee was not "black and white." Phillips testified that he nevertheless placed "significant" reliance on King's investigation and recommendation in deciding to terminate Hall, because King had spent a lot of time talking to Hall and directing her daily activities and trying to get Hall to adequately perform her duties. King was not present when Hall was terminated and did not sign off on any paperwork related to Hall's termination.

With regard to King's authority to appraise employees, the record shows that she is responsible for preparing annual appraisals for Logoteta and Denis. In this regard, the record contains an appraisal for Logoteta dated October 29, 2003, and another for Denis dated October 30, 2003, in which King assigned Logoteta and Denis ratings in the areas of work performance, job knowledge, attendance/punctuality, safety communication skills, adaptability/flexibility, interpersonal effectiveness and accountability. King testified that she filled out these forms and turned them into Friesen for approval. She then reviewed the appraisals with Logoteta and Denis. General Manager Friesen's signature appears on both appraisals, reflecting his approval of their contents, and Friesen testified that he agreed with King's assessments contained in the appraisals.⁵ According

⁵ General Manager Friesen testified generally with regard to appraisals, that supervisors are responsible for preparing employee annual performance evaluations and holding interviews with employees each October to discuss their career goals, strengths, weaknesses, etc. These evaluations rate employees based on a five-step system ranging from exceptional to unsatisfactory. According to Friesen, salary increases are based in part on overall performance. If an employee is rated at less than satisfactory, then he or she does not receive a salary increase. If an employee is rated at commendable or above, there are recommended percentages for salary increases ranging from approximately two and a half to five percent. Friesen testified that he must approve all appraisals and that appraisals do not go to

to Friesen, his day-to-day interactions with employees is not nearly as direct as that of Phillips or King, so his view of an employee's performance is much more general in nature. With regard to King's appraisal of Logoteta, the testimony of both King and Phillips is to the effect that Logoteta's appraisal was affected by problems Logoteta had being late to work. As discussed above, prior to issuance of the appraisal, King had verbally counseled Logoteta about being late to work on multiple occasions and this resulted in her rating in the category of attendance/punctuality in the appraisal being lowered by King from "admirable" to "commendable." However, while the appraisal document bears a rating of commendable in this category, the comment listed in this category is a positive one and contains no reference to Logoteta's tardiness.⁶ As noted above, ratings given in appraisals may have an impact on employee pay increases. However, the record does not indicate whether and/or how the lowering of Logoteta's appraisal rating in this instance affected her pay.

While the record reflects that King is authorized to resolve employee grievances without obtaining prior approval from higher management, it contains no tangible example of grievances that King has resolved. King testified that she is designated in the Employer's payroll system as a supervisor and Logoteta identified King as her "supervisor." Logoteta testified that when she is sick, she notifies either King or Office

employees until he has done so. He further testified that he questions supervisors and makes them defend the evaluations they prepare.

Operations Manager Phillips testified that he plays no formal role with regard to appraisals prepared by supervisors and does not approve the appraisals. However, he testified that he acts as a mentor to the supervisors, discusses the appraisals they prepare with them, and asks if they are certain about their assessments.

⁶ The comment on the appraisal in the category of attendance/punctuality is: "Lisa is consistently regular in attendance and can be relied upon to do her job and any other assigned tasks."

Manager Trini Baker. In this regard, King testified that she is authorized to approve or disapprove sick leave requests. In addition, when Office Manager Baker is not present, King may authorize employees to leave work early on her own authority. King also testified that she is authorized to request employees to work overtime although she has never done so. Finally, the record shows that on one occasion, when Office Manager Baker was out of the office, King requested Logoteta to come to work on her day off in order to process the payroll. On this occasion, King told Logoteta that she could leave work once the payroll was finished.

As indicated above, with regard to King's authority over the CSRs, the record shows that she shares such responsibility with Office Manager Baker. King works closely with the CSRs on a daily basis and during busy periods she handles most of the delegation of work to them. King testified that she assigns work to the CSRs by determining who is most ahead in their regular work. She testified that she does not prioritize assignments given to employees. Employees to whom she assigns work are expected to do it and report back to her so she can check to make sure the work is done and for content. King also substitutes for Baker during the five to six weeks a year when Baker is on vacation. During such periods, King assumes all of Baker's responsibilities as office manager, which including running the office, overseeing all customer service matters, handling complaints from customers and resolving any conflicts that arise between employees. The record does not show that King has exercised Baker's authority to hire or fire employees.

With regard King's status as a confidential employee, King testified that she is not involved in negotiations with the Union and did not attend the only bargaining session

held since the Union was certified as the representative of the clerical unit. King further testified that she has no access to the Employer's bargaining notes and has had no involvement in preparing confidential labor relations materials for the Employer-Petitioner.

Analysis. As indicated above, the Employer-Petitioner contends that King must be excluded from the unit as a statutory supervisor or as a confidential employee. For the following reasons, I find that King is a statutory supervisor.

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the Employer-Petitioner, to hire, transfer, suspend, lay off, recall promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is interpreted in the disjunctive and the possession of any one of the authorities listed places the employee invested with this authority in the supervisory class. See *Providence Hospital*, 320 NLRB 717 (1996) enf'd 121 F.3d 548 (9th Cir. 1997).

To support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *International Center for Integrative Studies*, 297 NLRB 601 (1990); *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowen of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). An individual who exercises some "supervisory authority" only in a

routine, clerical, perfunctory, or sporadic manner will not be found to be a supervisor. *Id.*

Further, in determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347 (1981). Secondary indicia alone, such as job titles, differences in pay and attendance at meetings, are insufficient to establish that an employee is a statutory supervisor. *Laborers Local 341 v. NLRB*, supra; *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 fn. 6 (9th Cir. 1971); *Waterbed World*, 286 NLRB 425, 426 (1987).

Whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). It is well established that mere conclusory statements, without such supporting evidence, are not sufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Although a supervisor may have "potential powers . . . theoretical or paper power will not suffice. Tables of organization and job descriptions to do not vest powers." *Oil Workers v. NLRB*, 445 F.2d at 243. In addition, the evidence must show that the alleged supervisor knew of his or her authority to exercise such power. *NLRB v. Tio Pepe, Inc.*, 629 F.2d 964, 969 (4th Cir. 1980).

Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

In the instant case, I find that King is a statutory supervisor based on her authority to effectively recommend employees for hire and promotion, as demonstrated by her effective recommendations involving the hire of Yanez as a permanent CSR and the promotion of Logoteta from the position of CSR to that of human resources coordinator. My finding is also supported by King's authority to appraise Logoteta and Denis since there is no evidence that management has altered her appraisals, and the record reflects that appraisals can affect employees' pay. Finally, King's own testimony shows that she is authorized to allow employees to leave work early, grant time off, request employees to work overtime, and to request that employees work on their day off if the need arises.

In finding that King is a statutory supervisor, I do not rely on King's role in disciplining employees, as the record contains no tangible example of her authority in this regard beyond oral counselings. Although it is plain that King orally counsels employees, relays information to management concerning employee performance and attendance issues, and documents such matters in preparation for disciplinary action, there is insufficient evidence in the record to show that she has made effective recommendations in this area. In this regard, I note that the only example in the record of King's involvement in any disciplinary action beyond an oral counseling is the termination of CSR Tonya Hall. The evidence regarding the Hall situation shows that Office Manager Baker also participated in the meeting where Hall was counseled about a particular incident, and that management conducted its own independent investigation

before deciding to terminate Hall. Thus, the record does not establish that King's recommendation was "effective," even if it was accorded "significant weight" in management's decision-making process.

In sum, given King's authority to effectively recommend hiring and promotions, evaluate and appraise employees, allow employees to leave work early, grant time off, and direct employees in their work, I find that she is a statutory supervisor. In reaching this conclusion, I have carefully considered the arguments of the Union. As indicated above, I find that the record evidence is insufficient evidence to support a finding that King is a supervisor based on her authority to discipline and terminate employees or to effectively recommend such actions. However, the direct testimony of Phillips that he promoted Logoteta and hired Yanez as a permanent employee based on King's recommendation supports a finding that she is a statutory supervisor based on her authority to effectively recommend hiring and promotions. This finding along with those factors set forth above, establishes that she is a statutory supervisor.

Accordingly, Assistant Office Manager Nicci King is hereby excluded from the unit.⁷

The Human Resources Coordinator. Lisa Logoteta has been the Employer-Petitioner's human resources coordinator since October 2002. The Employer-Petitioner contends that Logoteta should be excluded from the unit a confidential employee. The Union takes the opposite view. The parties stipulated, and I find, that Logoteta is not a statutory supervisor.

⁷ Because I have excluded King from the unit as a statutory supervisor, there is no need to determine her status as a confidential employee. However, assuming *arguendo*, that King were found *not* to be a statutory supervisor, I would find that she is not a confidential employee as the evidence in the record does not support such a finding.

The job description for the human resources coordinator position states that the person in this position provides administrative support for personnel records, payroll and other related functions at the subsidiary level. In a section titled, “Decision Making Skills and Impact,” the job description states: “Freedom limited to selection of appropriate procedures. Deviation referred to supervisor.” The position requires a high school diploma or GED and strong math skills in order to determine benefits and payments and to perform statistical analysis of benefit plans. General Manager Friesen testified that the human resources coordinator is involved in the day-to-day application of the employee manual, laws and regulations, and the collective-bargaining agreement with the Union to determine payroll and direct benefits questions. According to Friesen, he consults with Logoteta when questions arise in these areas. However, he testified that her involvement is typically limited to retrieving files and other materials for management. As discussed above, Logoteta is directly supervised by Assistant Office Manager King.

Logoteta’s duties include coordinating background checks of job applicants through the use of an outside screening company. The reports generated by the outside company are sent to Logoteta electronically, and she gives them to management. The record reflects that on one occasion, Logoteta brought a job applicant’s felony conviction that appeared in these reports to the attention of Refuse Collection Manager Pardini. Drug test results on job applicants go directly to Operations Manager Phillips and Logoteta files the results. She also enters new hire information into the Employer-Petitioner’s data base.

Logoteta handles new hire orientations by putting together and distributing the necessary forms and documents, including W-4 and I-9 forms and emergency contact

forms. At these orientations, she distributes copies of the employee manual and the collective-bargaining agreement, and explains what these documents are to the employees. If questions are asked that she cannot answer, she raises them with management. She also asks employees to sign a form acknowledging receipt of such documents.

Another of Logoteta's duties is to handle the weekly payroll. Part of this function involves Logoteta's verification that the information entered into the computer by supervisors regarding time and attendance is consistent with the information employees enter on their timecards. If Logoteta finds a discrepancy, she is responsible for checking with the supervisor involved and makes corrections. She also maintains a spread sheet showing the number of hours employees have worked and their accrued vacation, sick leave and pension hours. She uses this spread sheet to verify that entries into the time data system are correct and comport with the vacation and sick leave that an employee has actually accrued. If she finds discrepancies between the information on the spread sheet and the payroll, Logoteta is responsible for correcting them by checking with the appropriate supervisor and making the necessary payroll adjustments. For example, if an employee is not paid for worked overtime, Logoteta adjusts the system so that the overtime is paid in the next paycheck.

Logoteta also generates a union dues report and reconciles this report with the dues check-off list the Union sends to the Employer-Petitioner on a monthly basis. If she finds any discrepancies, she reports them to Operations Manager Phillips. The record contains no evidence concerning any dispute between the Employer-Petitioner and the Union regarding dues checkoff since Logoteta became the human resources coordinator

in 2002. However, Phillips testified that Logoteta's predecessor dealt with a dispute involving whether the Employer-Petitioner had properly forwarded to the Union the dues for a long-term Union member. According to Phillips, on that occasion, the human resources coordinator had gathered the necessary information and accompanied Phillips to the Union's office in order to explain the information so the discrepancy could be worked out.

In addition, at the end of each month, the Teamsters Benefit Trust Fund sends the Employer-Petitioner a statement for each employee covered under the Union's contract for drivers, shop and recycling employees. This statement reports the amount the Employer-Petitioner owes the Trust Fund for employees' pension and medical benefits. Logoteta verifies the amounts reported against her spread sheet. If an employee has worked over eighty hours in a month, she sends the invoice to the accounts payable clerk to be paid. If the employee has worked less than eighty hours that month, she marks the employee ineligible for the benefit payment, using the applicable code. If issues arise, she brings them to the attention of Phillips.

Logoteta also ensures that copies of written warnings issued to employees covered by the collective-bargaining agreement are given to the Union within three days. She prepares status change forms which reflect changes in pay rates and is responsible for ensuring that periodic pay rate increases provided for in the Union contract are given in a timely manner. Changes in pay rates are ultimately approved by General Manager Friesen.

With regard to Logoteta's function when employees are disciplined or terminated, Operations Manager Phillips notifies Logoteta if he is going to terminate an employee.

She prepares the standard termination letter for Phillips to sign or makes a copy of the letter Phillips has prepared and signed. She then prepares a final paycheck and includes it with the termination letter, which she mails to the employee, and places a copy of the termination letter in the Employer-Petitioner's files. Logoteta is also responsible for ensuring that copies of written warnings and termination letters are sent to the Union within three days of the action being taken.

With regard to workers' compensation claims, Logoteta is the Employer-Petitioner's primary contact person with the workers' compensation third party administrator. Employees fill out workers' compensation claim forms and give them to their supervisors who give them to Logoteta. She enters the information from these forms into the computer system. This information is sent electronically to the third party administrator. Logoteta also faxes copies of forms turned in by employees for doctor visits to the third party administrator and she maintains a workers' compensation file for employees. She also answers questions from the third party administrator, such as whether an employee has returned to work, etc.

Logoteta responds to employees' questions about the Family Medical Leave Act (FMLA) and communicates with the Employer-Petitioner's corporate human resources department in order to respond to employee questions about FMLA, workers' compensation and other matters. Logoteta has access to the human resources files in the computer system and she maintains computer data bases with employee home addresses and other information. These computer files are also accessible to Office Manager Trina Baker, Assistant Office Manager Nicci King and Accounts Payable Clerk Veronica

Denis.⁸ In addition, Logoteta has access to medical information about employees because of the need for her to handle such information with regard to workers' compensation and other payroll matters. Other persons who have access to employee medical files are General Manager Friesen, Operations Manager Phillips and Office Manager Baker.

On one occasion, the Employer-Petitioner's corporate human resources department solicited Logoteta's input on the revision of a new performance appraisal. In this regard, the record contains an e-mail from the Employer-Petitioner's corporate level Human Resources Director, Julie Bertani-Kiser, dated May 24, 2004, addressed to group managers, general managers, corporate department heads and human resources coordinators, soliciting input on a draft of a revised non-bargaining unit performance appraisal. Logoteta testified that she responded to this e-mail and has received a couple of e-mails of this type e-mail since she began working as the human resources coordinator. The record does not contain her response to this e-mail. General Manager Friesen testified that Logoteta receives similar e-mails two or three times a year from corporate management and that the Employer-Petitioner considers such e-mails to be confidential.⁹ Friesen was unaware whether any of the input provided by Logoteta had ever been utilized by corporate human resources. Friesen further testified that Logoteta has regular contact with corporate human resources in dealing with issues that arise regarding payroll, and there is at least one annual gathering of the human resources

⁸ No party contends that Denis is a supervisor or a confidential employee.

⁹ The record contains an appraisal for Logoteta dated October 3, 2004, which states in part that she understands the importance of the confidentiality in her position.

coordinators at the Employer-Petitioner's corporate office. According to Friesen, these annual meetings are held to distribute information about policy changes that have been made or are being considered by the Employer-Petitioner. The record does not disclose Logoteta's role at these conferences.

In addition to the foregoing duties, Logoteta also inputs information pertaining to city weight tags for debris hauled by the Employer-Petitioner to the City of Vallejo Transfer Station.

The record reflects that Logoteta represented the Union at the one bargaining session the Employer-Petitioner and the Union have held since the Union was certified as the representative of the clerical unit. She has never attended bargaining sessions or grievance meetings as a representative of the Employer-Petitioner. Friesen testified that prior to Logoteta, Trina Baker, who was then assistant office manager, was handling the same functions that Logoteta currently handles. According to Friesen, in prior collective bargaining negotiations, Baker had assisted in providing and preparing information for management pertaining to the number of employees in different classifications and the potential financial impact on the Employer-Petitioner of bargaining positions, such as the cost of pension versus payroll increases, etc. However, as to the latter type of information, Friesen testified that he was unsure how closely Baker had been involved in this process because she was not solely responsible for such matters. Rather, such information was retrieved and provided to the Employer-Petitioner's accountant.

There is no evidence that Logoteta is involved in the preparation of performance appraisals for other employees or has any involvement in the process of hiring, firing, transferring or disciplining other employees. Nor is there any evidence of her

involvement in collective bargaining on behalf of the Employer-Petitioner. Thus, as indicated above, Logoteta has never attended bargaining meetings or grievance hearings on behalf of the Employer-Petitioner and she has never prepared bargaining proposals or been involved in bargaining strategy meetings held by the Employer-Petitioner. While Logoteta processes paperwork pertaining to disciplinary actions, grievance adjustments and pay increases, and she may retrieve and file certain information for the Employer-Petitioner or process payments being made pursuant to grievance settlements, she has no involvement in the actual decision making process pertaining to such matters. No employees report to Logoteta.

Logoteta is hourly paid and receives overtime pay and her position is considered nonexempt.

Analysis. Although the Act does not expressly exclude "confidential" employees from the definition of employees, the Board has long excluded them from bargaining units. In *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956), the Board, stated its intention to "adhere strictly" to the definition limiting "confidential" employees to embrace only those employees "who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." This became known as the "labor nexus" test. *Kleinberg, Kaplan, Wolff, Cohen & Burrows*, 253 NLRB 450 (1980). The Supreme Court affirmed the Board's interpretation of the Act respecting "confidential" employees, including the restriction that the term applies only to confidential employees with a "labor nexus" in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981). Thus, the Court endorsed the Board's "labor nexus" test as excluding those whose access to confidential data is merely access

to confidential "business information." 454 U.S. at 184-191. Stated differently, non-labor related matters, even though confidential, are "irrelevant to the determination of whether [a] secretary [is] a confidential employee." 454 U.S. at 191-192. As the Board expressed it in *Intermountain Rural Electric Assn.*, 277 NLRB 1, 4 (1985), *enfd.* 1988 WL 166520 (10th Cir. 1988):

Under this definition it is insufficient that an employee may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it.

The Court in *Hendricks* also approved the Board's alternative test that employees who have "regular" access to confidential information concerning anticipated changes that may result from collective bargaining negotiations are deemed confidential employees and may properly be excluded. *Id.*

The Board applies this narrow test and refrains from broader definitions of confidential employees because many employees have arguably confidential relationships with management and because expansive application of the exclusionary rule would deprive many employees of their right to bargain collectively. *NLRB v. Los Angeles Hospital*, 640 F.2d 1017 (9th Cir. 1981). Under such precedents, the fact that an employee may prepare the payroll (including that for union as well as nonunion employees), or file and maintain absenteeism reports and warning letters or other disciplinary matters in personnel files, is "irrelevant." This is so because such matters have no material connection with negotiations for a collective-bargaining agreement. Thus, in *Bakersfield Californian*, 316 NLRB 1211 (1995), the secretary to the retail

advertising manager was found, in effect, not to be a "labor nexus" confidential employee, even though she typed and processed payroll and disciplinary matters and grievances and typed the collective bargaining notes of the retail advertising manager. By contrast, the secretary to the classified advertising manager was excluded from the bargaining unit as a confidential employee because she had access to the manager's labor strategy notes. 316 NLRB at 1211-1213. Additionally, in *Lincoln Park Nursing Home*, 318 NLRB 1160, 1164 (1995), the Board ruled that "merely having access to files containing confidential material, including records of grievances, does not establish confidential status." Moreover, "the typing of disciplinary matters, grievances, or other material relating to personnel problems" does not render an employee a "confidential employee" within the meaning of Board law. *Lincoln Park*; see also *Milwaukee Children's Hospital Ass'n*, 255 NLRB 1009, 1014 (1981); *Ladish Co.*, 178 NLRB 90 (1969); *Hampton Roads Maritime Ass'n*, 178 NLRB 263 (1969); *RCA Communications*, 154 NLRB 34, 37 (1965). Indeed, using the Supreme Court's terminology from *Hendricks County*, 454 U.S. at 191, such evidence, not being of the labor nexus type, is "irrelevant." See *In re E.C. Waste, Inc., d/b/a E.C. Waste Management De Puerto Rico*, 339 NLRB No. 39 (June 13, 2003).

Finally, the burden of proof in these cases is on the party asserting that an employee is a confidential employee. See *In re E.C. Waste, Inc., d/b/a E.C. Waste Management De Puerto Rico*; *Intermountain Rural Electric Assn.*, 277 NLRB 1, 4 (1985).

In the instant case, the Employer-Petitioner has not carried its burden to establish that Logoteta is a confidential employee. There is no showing that she assists and/or acts

in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations. *Associated Day Care Service of Metropolitan Boston*, 269 NLRB 178 (1984). First, the record does not establish that Logoteta is in a close working relationship with General Manager Friesen, Operations Manager Phillips, or any other manager who decides and effectuates management labor policy. Nor does the record establish that she is entrusted with decisions and information regarding such policies before they are made known to those affected. Logoteta is the Employer's administrative support person for processing the payroll, maintaining personnel records and other related functions. Her immediate supervisor is Assistant Office Manager King, not General Manager Friesen or Operations Manager Phillips. While King is a statutory supervisor, the record does not reflect that King has any involvement in collective bargaining or formulating, determining or effectuating management policies. Although Logoteta retrieves information and processes paperwork related to payroll and benefits, union dues, workers' compensation and disciplinary matters, the record does not establish that she acts in a confidential capacity to a manager who is involved in collective bargaining. Nor is this kind of relationship demonstrated by the fact that she brings discrepancies involving payroll and attendance matters to management's attention and confers with management about the application of Employer policies, laws and regulations related to payroll issues. There is no evidence that Logoteta has any involvement in preparing bargaining proposals, strategy notes or that she attends bargaining meetings on behalf of the Employer-Petitioner.

The fact that Logoteta's predecessor on one occasion was expected to retrieve payroll or benefits information that the Employer-Petitioner used to formulate a

bargaining position does not establish that the position is a confidential one. Thus, there is no showing that her predecessor's role in this regard was anything more than an information gathering function or that her predecessor even knew the intended purpose of the information she was compiling. See, e.g., *Case Corp.*, 304 NLRB 939 (1991); *Washington Post Co.*, 254 NLRB 168, 197 (1981), and cases cited therein. Nor does the fact that Logoteta occasionally receives e-mails from corporate management soliciting her views on matters such as revisions to appraisal forms establish a labor nexus since it appears that such solicitations are sporadic and do not reflect a regular part of Logoteta's work functions. Moreover, the record does not show what use, if any, is made of Logoteta's response to such solicitations. The fact that Logoteta's job duties include handling new employee orientations, where she passes out payroll forms, employee policy manuals and Union contracts, is not sufficient to make her a confidential employee.

I also find that Logoteta does not meet the Board test for confidential status under the alternative standard, which requires that she have regular access to confidential information concerning anticipated changes that may result from collective bargaining negotiations. Thus, her preparation of the payroll for union and nonunion employees and her filing of documents related to disciplinary and termination matters does not support a finding that she is a confidential employee since such functions have no relation to collective bargaining negotiations. *In re E.C. Waste, Inc.*, 339 NLRB No. 39. Likewise, her access to employee personnel, workers' compensation and medical files does not establish that she is a confidential employee. *Lincoln Park Nursing Home*, 318 NLRB

1160, 1164 (1995). In these circumstances, I find that Human Resources Coordinator Logoteta is not a confidential employee and included her in the unit.

In reaching this conclusion, I have carefully considered the Employer-Petitioner's arguments and I do not find them persuasive. Simply because the Employer-Petitioner relies on Logoteta for its basic payroll functions does not make her a confidential employee even if it does make her privy to Employer business records and employee personnel and medical files. Nor do I find the cases cited by the Employer to be persuasive as they all involve situations in which the work of the alleged confidential employee was of a "labor nexus" type and are therefore distinguishable from the circumstances in the instant case. Thus, *Prince Gardner, Division of Swank*, 231 NLRB 96(1977), involved the Board's finding that a receptionist in the employer's personnel department was a confidential employee based on evidence that her work was an integral part of the personnel manager's implementation and development of labor relations policy. *ITT Grinnel*, 253 NLRB 1138 (1980), involved a Board finding that a personal secretary to an assistant plant manager was a confidential employee where she typed interoffice memos to the personnel manager involving labor relations matters. In *Lorimar Productions, Inc.*, 257 NLRB 1138 (1981), the Board found that production coordinators who assisted unit production managers who formulated above-scale contracts for employees and resolved grievances were confidential employees. In *Emmanuel Hospital*, 268 NLRB 1344 (1984), the Board found that the assistant to the director of personnel services was a confidential employee because she handled all correspondence that he had with legal counsel, labor unions, and government regulatory agencies, including the Board and HEW; she notified the various departments when

employees were subject to discharge under labor agreements for failing to maintain good standing; she typed contract proposals on behalf of the employer and the final agreements when reached; she typed wage forecasts prepared by the director of personnel for both bargaining unit and nonunit employees; she typed memoranda regarding salary recommendations for management; and she prepared drafts and final responses to union grievances. In *State, County and Municipal Employees*, 224 NLRB 1057 (1976), the Board found that the area director's personal secretary, who assisted him in the preparation of confidential correspondence to be sent to the employer's Washington, D.C., headquarters; who typed evaluations, recommendations for employment and pay raises, and disciplinary warnings; prepared correspondence dealing with labor relations; and handled collective-bargaining related clerical duties was a confidential employee. Finally, in *Mental Health Center*, 224 NLRB 1057 (1976), the Board found that the administrative assistant to the employer's drug director was a confidential employee, where the drug director was on the employer's executive committee and was part of the Employer's labor relations team, and the administrative assistant was present at meetings with the drug director where raises and disciplinary actions were discussed and she also had access to nonpublic reports that came out of executive committee meetings.

As noted above, these cases are all distinguishable from the instant case as they involve situations where the work performed by the alleged confidential employee was of a "labor nexus" type. Unlike the cases cited by the Employer-Petitioner, the record evidence in the instant case does not establish that Logoteta assists and/or acts in a confidential capacity to persons who formulate, determine and effectuate the Employer-

Petitioner's labor relations policies. In these circumstances, she will be included in the unit.

In view of the foregoing, I will clarify the unit to exclude the assistant office manager and to include the human resources coordinator.

ORDER

IT IS HEREBY ORDERED that the certification of representative issued in Case 20-RC-17933 be, and it hereby is, clarified to exclude the classification of assistant office manager and to include the classification of human resources coordinator.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington, D.C. by November 18, 2004.

Dated at San Francisco, California, this 4th day of November, 2004.

Robert H. Miller, Regional Director
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